SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 683

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Petitioner

vs.

A. D. SCHENDEL, as Special Administrator of the Estate of Clarence Y. Hope, Deceased,

Respondent.

BRIEF OF PETITIONER

A.

SUBJECT INDEX.

TABLE OF CASES

In favor judgment

B.

The opinion of the court below, the Supreme Court of Minnesota, is reported in *Schendel* vs. *Chicago, Rock Island and Pacific Railway Company*, 204 N. W. 552, filed June 19, 1925. It is not yet reported in the official Minnesota Reports.

C.

1. The date of the judgment sought to be reviewed is June 30, 1925. (R. 122.)

2. The specific claims advanced and the rulings made which are relied upon as the basis of this court's jurisdiction are:

Petitioner claimed both in the District Court of Steele County, Minnesota, and in the Supreme Court of Minnesota that a certain judgment of the District Court of Lucas County, Iowa, was *res judicata* and a bar to plaintiff's cause of action under the full faith and credit claims of the Constitution of the United States, Section 1, Article IV. This claim of your petitioner was determined both by the District of Steele County, Minnesota, and by the Supreme Court of Minnesota, against your petitioner. Petitioner especially set up and claimed a right under the Constitution of the United States, and the right so expressly set up and claimed was denied by the Supreme Court of the State of Minnesota. (R. 7, 8, 43, 44, 45, 104, 105, 106-109, 113-122.)

3. The jurisdiction of this court is invoked in this cause under Section 237 of the Judicial Code as amended by the Act of February 13, 1925, "An act to amend the Judicial Code and to further define jurisdiction of the Circuit Courts of Appeal, and of the Supreme Court, and for other purposes."

4. The jurisdiction of this court is based upon the order of this court dated October 19, 1925, granting a writ

of certiorari to review the final judgment of the Supreme Court of Minnesota, this order being made under Rule 40 of the Revised Rules of this court effective July 1, 1925. (R. 123.)

D.

STATEMENT OF FACTS.

This court granted a writ of certiorari to review the final judgment of the Supreme Court of Minnesota.

This case and its companion case *Chicago, Rock Island and Pacific Railway Company,* petitioner, vs. *Fred A. Elder,* Respondent (No. 684, October term, 1925), in which case a writ of certiorari has likewise been granted by this court, grew out of the same accident. The two cases, while different in some respects, have most points in common. The two cases should be considered together.

Decedent was killed in a wreck near Pershing, Iowa, (within the State of Iowa), on February 4, 1923. The question at issue was whether decedent was engaged in interstate commerce so that the remedy was under the Federal Employers' Liability Act of April 22, 1908, or intrastate commerce so that the remedy was under the Workmen's Compensation Act of Iowa. (R. 53-80.) A summary of the provisions of the state act is found in

Hunter vs. *Colfax Consolidated Coal Co.,*
175 Iowa, 245, 154 N. W. 1037,

and in

Hawkins vs. *Bleakly,* 243 U. S. 210,

and in the opinion of the court below. (R. 113-122.)

Petitioner contends that a certain unreversed judgment entered in the District Court of Lucas County, Iowa, on June 2, 1923, conclusively determined the commerce to be intrastate. This judgment reads as follows:

> "The Court further finds * * * that said Clarence Y. Hope was not at the time of his death engaged in interstate commerce and that Mrs. Clarence Y. Hope as the surviving widow of said decedent is entitled to an award of compensation under the Iowa Workmen's Compensation Law." (Record 92.)

Eliminating entirely for the moment the effect of this Iowa judgment, and viewing the other facts as shown by the record most favorably to the plaintiff-respondent, the most that could be claimed by plaintiff-respondent is that the evidence made a question of fact as to whether decedent was engaged in interstate commerce. Petitioner contended in the court below, as will be seen from the opinion below, (R. 114-116), and still contends that (even without the Iowa judgment) decedent was engaged in intrastate commerce as a matter of law.

We are, however, arguing the question of the effect of the Iowa judgment as though the evidence, aside from that judgment, made, as the court below held, an issue of fact for the jury's determination.

Briefly, the evidence showed with respect to interstate commerce that decedent and all his train crew were residents of Chariton, Iowa, the station just south of Pershing on the main line. On the day of the accident the crew received orders to work the mines, and proceeded north on the main line from Chariton to Pershing, and thence down a spur track to Mine No. 2. Here they picked up nine loaded cars of coal, which they brought back to Pershing and put on the side tracks at that point. Of the nine cars in this first drag, seven were consigned to points within the state of Iowa and two to points outside of that state. In other words, the last two were interstate cars. (Record 15, 51.)

After the first drag of cars was spotted at Pershing, the crew went down the spur track to Mine No. 3 and brought back ten cars of coal. All of these cars were intrastate cars consigned to points within the state of Iowa. (Record 16-18, 51.)

Fred A. Elder, one of the brakemen of the crew, and respondent in the companion case referred to, testified that

after the second drag was brought in the crew moved the second drag against the first drag and set the brakes on the two interstate cars on the first drag. (Record 33, 34.)

The second drag arrived at Pershing about noon. It being Sunday, the crew, after receiving a wire from the despatcher that the main line track to Chariton was clear, started to Chariton for dinner with only an engine and a caboose, and without any other cars. On the way in, they collided with a north bound passenger train, resulting in the wreck as a result of which decedent died. The accident was caused by a mistake of the despatcher in his train orders. (Record 36.)

The court below held that this record made a question of fact for the jury on interstate commerce, and refused to give any effect whatever to the Iowa judgment, to which we shall now refer. (Record 46, 47.)

Respondent began this action under the Federal Employers' Liability Act in the District Court of Steele County, Minnesota, on February 21, 1923. (R. 1.) On March 2, 1923, petitioner began a proceeding before the Industrial Commissioner of Iowa under and pursuant to the Iowa Workmen's Compensation Act. (R. 81, 82.) Under the Act, the adverse party is the widow, (Sub. 4, Par. c. Sec. 2477-M-16, R. 68), and Mrs. Hope, decedent's widow, was duly made a party to the proceedings. She was likewise the sole beneficiary under the Federal Employers' Liability Act, if there were any cause of action under that act. (R. 43.) She answered, asserting that the deceased was engaged in interstate commerce, and hence that the Iowa Compensation Act was without application. (R. 82, 83.) The arbitration committee provided for by the Iowa Compensation Act, found that decedent was engaged in intrastate commerce. (R. 84.) Mrs. Hope filed an application in review, and the Industrial Commissioner affirmed the arbitration

committee and determined that deceased was engaged in intrastate commerce. (R. 85-89.) Mrs. Hope appealed from that decision to the District Court of Lucas County, Iowa, (R. 90), and that Court, on June 2, 1923, entered the judgment just mentioned affirming the Industrial Commissioner and adjudging specifically that the deceased was engaged in intrastate commerce. (Record 91-92.)

All these proceedings were strictly in accordance with the Iowa Workmen's Compensation Act, which appears in full in the record. (R. 53-80.) Its provisions can best be summarized by quoting from the opinion of the Supreme Court of Iowa in the case of

Hunter vs. *Colfax Consolidated Coal Co.*,
175 Ia. 245, 154 N. W. 1037, 1060.

"If the parties in interest fail to reach an agreement in regard to compensation under the act, either party may notify the commissioner, who thereupon forms a committee of arbitration of three of which the commissioner is one and is chairman. The other two shall be named respectively by the two parties. If a vacancy occurs it shall be filled by the party whose representative is unable to act. Section 27. Then comes provisions as to the oath to be administered the arbitrators, and other provisions as to filling vacancies. Sections 28, 29.

It is next provided the committee shall make such inquiries and investigations as it shall deem necessary, where the inquiry shall be held, and that the decision of the committee, together with a statement of evidence submitted before it, its findings of fact, rulings of law, and any other matters pertinent to questions arising before it, shall be filed with the commissioner. Unless a claim for review is filed by either party within five days, the decision becomes enforceable under the provisions of the act. Section 30. The commissioner has power to subpoena, administer oath, examine such books and records of the parties to a proceeding or investigation as relate to questions in

dispute or under investigation; and may make rules and regulations, not inconsistent with the act, for carrying out its provisions. Section 25.

If a claim for review is filed, the commissioner shall hear the parties, and may hear evidence in regard to any or all matters pertinent thereto, and may revise the decision of the committee in whole or in part, or refer the matter back to it for further findings of fact, and he shall file its decision with the record of the proceedings, and notify the parties. No party shall, as a matter of right, be entitled to a second hearing upon any question of fact. Section 33."

See Secs. 2477-M-26 to 33, (Record 72-75.)

Section 2477-M-33, (R. 75), provides for an appeal to the District Court.

In this action, in the District Court of Steele County, Minnesota, the judgment of the District Court of Lucas County, Iowa, was pleaded as *res judicata,* and as a bar under the full faith and credit clause of the United States Constitution, (R. 7-8.) The action was tried on March 4, 1924, (R. 9), resulting in a verdict for the plaintiff, (R. 103), and necessarily a finding by the jury that the decedent was engaged in interstate commerce, which was the only question submitted to it. (R. 46-47.)

Petitioner offered in evidence a copy of the Iowa judgment, including all proceedings leading up to it, duly exemplified according to federal requirements. (R. 43, 81-93.) Upon objection, it was excluded by the court generally, although permitted in evidence for the purpose of a motion by petitioner for a directed verdict. (R. 43-44.) Such motion by petitioner for a directed verdict was thereafter made upon the strength of the Iowa judgment, (R. 45), and denied by the court. (R. 45.) After the verdict, the court denied a motion for judgment notwithstanding the verdict or for a new trial on the same ground. (R. 104-109.)

From a judgment entered on the verdict, (R. 109), petitioner appealed to the Supreme Court of Minnesota (R. 110), urging the same ground of reversal. (R. 110-112.) The Supreme Court filed its opinion and order for judgment on June 19, 1925, in all things sustaining the lower court, (R. 113-122), and on June 30, 1925, final judgment of affirmance was entered in the Supreme Court. (Record 122-123.)

Within the time allowed by law, (August 17, 1925) petitioner filed a certified copy of the record of this court, together with its application for a writ of certiorari. This writ was granted on October 19, 1925. (R. 123.)

The federal question, the denial of petitioner's rights under the full faith and credit clause of the Constitution, was squarely raised at the following stages of the proceedings:

1. Second Supplemental Answer. (Record 7-8.)
2. Offer of Iowa judgment in evidence. (Record 43-44.)
3. Motion for a directed verdict. (Record 45.)
4. Motion for judgment notwithstanding the verdict or a new trial. (Record 104-106.)
5. In the Supreme Court upon appeal from the judgment. (Record 110-112.)

E.

ASSIGNMENTS OF ERROR

The Supreme Court of the State of Minnesota erred:

I

In refusing to give full faith and credit to the final judgment of the District Court of Lucas County, Iowa, contrary to Section 1 of Article IV of the Constitution of the United States.

II

In entering final judgment affirming the District Court of Steele County, Minnesota, in refusing to give full faith and credit to the final judgment of the District Court of Lucas County, Iowa, contrary to Section 1 of Article IV of the Constitution of the United States.

III

In entering judgment affirming the District Court of Steele County, Minnesota, in

(a) Refusing to receive in evidence the exemplified copy of the Iowa judgment.

(b) Refusing to direct a verdict for the defendant (petitioner) because of said Iowa judgment.

(c) Refusing to grant judgment for the defendant (petitioner) notwithstanding the verdict of the jury against it because of said Iowa judgment.

(d) Refusing to grant a new trial because of said Iowa judgment.

(e) Entering judgment in favor of plaintiff (respondent) and against defendant (petitioner) contrary to said Iowa judgment.

F.

SUMMARY OF ARGUMENT

1. The judgment of the District Court of Lucas County, Iowa, adjudging that decedent was engaged in intrastate commerce, constituted an estoppel by verdict and forever established that fact.

2. Since the fact of interstate commerce was asserted as a defense before the Iowa court, that court had jurisdiction to determine the fact as to the character of the commerce in spite of the fact that the same issue was involved in the action pending in the District Court of Steele County, Minnesota, the court below.

3. Even if the District Court of Lucas County, Iowa, ought not to have determined that issue, because the same issue was involved in the action in the court below, its ruling that it might determine the issue and its determination thereof at most constituted an error of decision, and did not affect its jurisdiction. If the Iowa court reached an erroneous conclusion, the way to correct it was by proper appellate procedure and not by collateral attack upon its judgment.

4. A judgment is binding not only upon the parties, but their privies. The respondent, as administrator, is in privity with the widow, since the administrator is merely trustee under the Federal Employers' Liability Act, for the benefit of the beneficiaries, and the widow was in this case the sole beneficiary.

5. In refusing to give effect to the judgment of the District Court of Lucas County, Iowa, the courts below violated petitioner's rights under the full faith and credit clause of the Constitution of the United States.

G.

ARGUMENT

The Supreme Court of Minnesota in its opinion holds that the judgment of the District Court of Lucas County, Iowa, was not entitled to full faith and credit under the federal Constitution because (1) the Iowa judgment was not binding for the reason that

> "without authority controlling or a certainty guiding us, we are content to hold that the substantive right given the employe or his representative by congress under express constitutional grant that the courts to which he may go for its enforcement pointed out to him is a superior substantive right, and that when he or his representative has chosen the forum to which to submit his cause, he cannot against his objection and upon the initiative of his employer, be required to submit it in a summary proceeding commenced later under a compensation act." (Record 119-120.)

(2) there was no identity of parties in the two actions, the party to the Iowa judgment being the widow (although the sole beneficiary in any event under the federal act), and the party to the Minnesota action being the administrator (although merely the trustee for such beneficiary for the purpose of suit). (Record 120-121.)

I

Binding Effect of the Iowa Judgment

The court's reasoning is

(a) Manifestly wrong, but

(b) Even if right as an abstract proposition of law does not support the conclusion reached in this case because such abstract proposition involves only the correctness of the Iowa court's decision and not its jurisdiction.

(a)

It should be unnecessary to cite authorities for the familiar rule that where a fact is once established by a judg-

ment of a tribunal of competent jurisdiction it cannot be litigated in another action.

In the case of

Southern Pacific Ry. Co. vs. *United States*, 168 U. S. 1.

this court said that a fact

> "so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of the rights of persons and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

The absolute necessity for such a rule is illustrated by this particular case.

Before the Iowa Industrial Commissioner there was no testimony by Elder as to shoving the cars in the second drag against the interstate cars in the first drag and the setting of the brakes on the two interstate cars in the first drag just before the crew went to dinner. This seems to have been a fact that was discovered later. Under the testimony before the Iowa Industrial Commissioner the last work done before the accident was purely and wholly an interstate move, i. e., bringing in ten wholly intrastate cars. The testimony before the Commissioner is not in the record, but the substance of it appears from the well reasoned opinion of the Commissioner. (R. 87-89.) Under the facts presented by that record, there could be no question but that the crew were engaged wholly in intrastate

commerce before going to Chariton for dinner, since the character of the work last done (intrastate) determines the character of the commerce.

Illinois Central Ry. Co. vs. *Peery,*
242 U. S. 292.
Smith vs. *Interurban Railway Co.* (Ia.),
186 Iowa 1045, 171 N. W. 134 (Certiorari denied November 24, 1919, 251 U. S. 552.)
Illinois Central Ry. Co. vs. *Behrens,*
233 U. S. 473.
Erie Ry. Co. vs. *Welsh,*
242 U. S. 303.

Upon the trial of this case, Elder gave the additional testimony referred to about setting the brakes on the interstate cars, adding:

"This was the last thing we ever did." (Record 34.)

What plaintiff was permitted by the courts below to do was to violate the rule laid down in *Southern Pacific* vs. *United States, supra,* and after having been defeated on one theory and the evidence introduced, try the case again upon a new theory and upon different facts.

While possibly the Iowa judgment is not *res judicata* in its broadest sense, in that it may not be an estoppel by judgment, it certainly constitutes an estoppel by verdict in that it squarely determines the character of the commerce and that determination is conclusive in this action.

An estoppel by judgment can only arise where the two cases are upon the same cause of action. An estoppel by verdict arises where the two cases are upon different causes of action but the same fact is in issue and the fact decided and determined. In the case before the Iowa tribunal, the cause of action was under the Iowa Workmen's Compensation Act. In the present case, the cause of action asserted arises under the Federal Employers' Liability Act. In each

case the question was whether there was any cause of action at all, this depending upon whether plaintiff's decedent was, at the time, engaged in interstate or intrastate commerce. This fact, having been expressly determined in the Iowa court, constitutes an estoppel by verdict and is binding upon all parties, and their privies.

In *Sheets* vs. *Ramer,* 125 Minn. 98, 145 N. W. 787, the court said:

> "A judgment on the merits is always an absolute bar to a second action between the same parties on the same cause of action. West vs. Hennessy, 58 Minn. 133, 59 N. W. 984; Swank vs. St. Paul City Railway Co., 61 Minn. 423, 63 N. W. 1088; Stitt vs. Rat Portage Lumber Co., 101 Minn. 93, 111 N. W. 948. Plaintiffs urge here that the causes of action are not the same. It may be that that contention is correct. The first action was one to set aside a conveyance as fraudulent. This action is to enforce an alleged agreement that the conveyance should not be absolute, but in trust. But it is not essential, to the operation of the estoppel, that the cause of action set up in the second action should be the same as that in the first. If a point at issue in the second action was decided in the first, the estoppel exists, no matter how different may be the form of action. McClung vs. Condit, 27 Minn. 45, 6 N. W. 399; Swank vs. St. Paul City Ry Co., 61 Minn. 423, 63 N. W. 1088. It is settled law 'that the judgment of a court of concurrent jurisdiction directly upon the point, is, as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another court,' even though the causes of action are not the same. Duchess of Kingston's Case, 2 Smith's Leading Cases, 693. This is termed 'estoppel by verdict'."

In *Meyers* vs. *International Co.,* 263 U. S. 64, the court said:

> "The general principles which must govern here are laid down in an oft-quoted opinion of Mr. Justice Field

in *Cromwell vs. Sac County*, 94 *U. S.* 351. In that case suit had been brought upon coupons attached to bonds issued by the county for the erection of a school house, and it was adjudged that the bonds and coupons were invalid in the hands of one not a bona fide holder for value before maturity, and as the plaintiff had not shown himself to be such a holder, he could not recover. In a second suit on other coupons from the same bond, he proved that he was a holder for value before maturity and the county sought to defeat the second suit by pleading the judgment in the first as *res judicata*. It was held that the cause was different and that the first argument was not a bar. Mr. Justice Field said, (pp. 352, 353):

'In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually

> litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action'."

In *Troxell* vs. *Delaware Y. & W. R. Co.*, 227 U. S. 434 (p. 440), this court said:

> "Where the second suit is upon the same cause of action set up in the first suit, an estoppel by judgment arises in respect to every matter offered or received in evidence or which might have been offered to sustain or defeat the claim in controversy, but where the second suit is upon a different claim or demand, the prior judgment operates as an estoppel *only as to matters in issue or points controverted and actually determined in the original suit.*"

As we read the opinion of the court below, it recognizes this rule but holds that since there was an assertion of a cause of action under the Federal Employers' Liability Act, the Iowa tribunal was immediately divested of its right to determine whether there was a cause of action under its own laws. In other words, while Mrs. Hope tendered as a defense in the Iowa proceedings the fact that the commerce was interstate, the Iowa tribunal lacked jurisdiction to determine the merits of the defense tendered and had to let some other tribunal decide it. The fallacy of the reasoning of the court below is at once apparent.

Absolutely no authority is cited to support the court's conclusion. *THE ONLY TWO AUTHORITIES IN THE COUNTRY SQUARELY IN POINT HOLD CONTRARY TO THE CONCLUSION REACHED.*

Williams vs. *Southern Pacific,*
202 Pac. 356, 54 Cal. App. 571. (Certiorari denied, 258 U. S. 622.)

holds squarely that such a judgment in a compensation proceeding is conclusive in an action under the Federal Employers' Liability Act. It is absolutely impossible to

distinguish the Williams case from the case at bar, although the court below attempts a fanciful distinction. Likewise, the case of

Dennison vs. *Payne*,
293 Fed. 333 (C. C. A. 2nd Cir.),

while differing with the California court in the Williams case, on the question of parties, holds squarely that where there is identity of parties the judgment in the compensation case is binding in the action under the Federal Employers' Liability Act.

The opinion in the Williams case was written by the District Court of Appeals of California, but the Supreme Court of California on December 15, 1921, adopted the opinion by refusing a hearing, and this court denied certiorari, but upon the ground that there was no final judgment.

There are involved two sovereign powers: The State of Iowa and the United States. Each is supreme in its own sphere, the state as to intrastate commerce, the United States as to interstate commerce. The United States cannot by legislation regulate or interfere with the conduct of intrastate commerce, or add to or subtract from any substantive right given by the state law except as may be necessary for the protection of interstate commerce.

First Employers' Liability Cases,
207 U. S. 463.

A state may neither regulate nor interfere with interstate commerce, nor can the state by legislation add to or subtract from any substantive right given by Congress. In that field the federal law is supreme.

Seaboard Air Line Co. vs. *Horton*,
233 U. S. 492.
Erie Railway Company vs. *Winfield*,
244 U. S. 170.
New York Central Ry. Co. vs. *Winfield*,
244 U. S. 147.

New York Central Ry. Co. vs. *Tonsellito*,
244 U. S. 316.

The State of Iowa has legislated as to the remedy to be given for an injury occurring in intrastate commerce and has created a tribunal for enforcing such remedy. That tribunal is the Industrial Commissioner, subject to review by the courts. The Commissioner has, under the specific terms of the act creating his office, jurisdiction only in cases occurring in intrastate commerce.

On the other hand, the federal government has, by the Federal Employers' Liability Act, legislated as to the remedy for an injury occurring in interstate commerce, and while not creating a new tribunal for the enforcement of rights under that act, it in effect has done so by utilizing the courts of the state and federal governments already in existence. These tribunals have jurisdiction (as to accidents occurring in Iowa) only of accidents in interstate commerce.

In order that either tribunal may exercise jurisdiction, it must find the jurisdictional facts as to the character of the commerce. It is fundamental that any tribunal has and must have jurisdiction to determine the facts on which its own jurisdiction depends. The Iowa tribunal, therefore, has and must have jurisdiction to determine whether the commerce is interstate or intrastate. If it finds interstate commerce, it lacks jurisdiction. If it finds intrastate commerce, it has jurisdiction.

Conversely as to Iowa accidents (and this plaintiff concedes), the tribunals for enforcing the Federal Act likewise have and must have authority to determine whether the commerce was intrastate or interstate, a determination of such fact being necessary to the determination of its own jurisdiction. If it finds the commerce to be intrastate, it is ousted of jurisdiction.

against the plaintiff's contention. This ruling the District Court of Lucas County affirmed.

The barrier which the Supreme Court of Minnesota does not attempt to and of course could not get over is that the proposition was squarely presented to the Iowa court and that the Iowa court and Commissioner did determine that in this particular case it was not required to await the decision of the Minnesota court. In other words, the situation is that the Iowa court differed from the Minnesota Supreme Court upon the effect of beginning an action in the Minnesota court. If the Minnesota Supreme Court is right, it merely means that the Iowa court was wrong, and if the Iowa court was wrong the way to correct the error was to appeal, and not by collateral attack upon its judgment. Thus, in

23 *Cyc.* 1088

it is stated:

> "Where the court judicially construes and adjudicates the question of its jurisdiction and decides that the facts exist which are necessary to give it jurisdiction of the case, the finding is conclusive and cannot be controverted in a collateral proceeding."
>
> See also 34 *Corpus Juris* 552 and cases cited.

In *Taylor* vs. *Robert Ramsey Co.,* 114 Atl. 830, the Supreme Court of Maryland held that the jurisdiction of the State Industrial Commission to make an award under the Compensation Act, was not open to collateral attack. The Industrial Commission had awarded compensation to a man engaged in a maritime occupation. This court thereafter in another case held that a state could not include men employed in maritime occupations within its compensation act.

Southern Pac. Co. vs. *Jensen,*
244 U. S. 205.

Therefore though the Industrial Commission was

clearly wrong, nevertheless it was held that the award under the compensation act was valid.

The only way to correct an error in the conclusion of the Iowa court having jurisdiction, is by direct appeal.

Toy Toy vs. *Hopkins,*
212 U. S. 542,

where this court held (syllabus):

> "Even though the Circuit Court erroneously retains jurisdiction of a criminal case against an allottee Indian, *its judgment is not void but should be corrected on appeal or by writ of error and cannot be attacked in habeas corpus proceedings.*"

Likewise in the case of *Dowell* vs. *Applegate,* 152 U. S. 327, this court said, on page 340:

> "These authorities above cited, it is said, do not meet the present case, because the ground on which it is claimed the Federal Court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. *Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal to this court.*"

II.

IDENTITY OF PARTIES.

In addition to the rule already referred to, that a judgment is also binding upon the parties to an action, there is the further rule that a judgment is also binding upon those in privity with the parties. The question presented is:

Is there such privity between Mrs. Hope and the plaintiff (the administrator) that a judgment to which Mrs. Hope is a party, binds the administrator? The court below held that there was no such privity.

The case of *Williams* vs. *Southern Pacific Ry.* 202 Pac. 356, 54 Cal. App. 571, to which reference has been made, on exactly identical facts, holds that there was privity and that the administrator was bound. Nothing could be added to the reasoning in that case. The Circuit Court of Appeals, in *Dennison* vs. *Payne,* 293 Fed. 333, reached an opposite conclusion. With all respect for that tribunal, it is submitted that the decision is poorly reasoned, and not in accord with the decisions of this court.

By the judgment of the District Court of Iowa, it was adjudged that Hope was engaged in intrastate commerce. Jessie Hope, the widow, was a party to that action. In this action it was contended by plaintiff and decided by the court below, that Hope was engaged in interstate commerce. This action is brought by the administrator under the Federal Employers' Liability Act, which provides that the action may be maintained by the personal representative "for the benefit of the surviving widow." In this case the widow is the sole beneficiary and is entitled to any recovery in this action. There are no dependent children, it being stipulated upon the trial that the stepchildren mentioned in the complaint were not entitled in fact to any recovery in this action. (R. 72.)

Neither the representative, the plaintiff in this action, nor the estate, has any interest in the cause of action or the recovery. This, as indicated, belongs solely to the widow, the representative being merely the trustee for the purpose of bringing suit.

Gulf Ry. Co. vs. *McGinnis,*
228 U. S. 173.

In the Iowa action, Mrs. Hope was the real party in interest as well as the nominal party; in the Minnesota action she is the real party in interest, but not the nominal party.

The view of this court on the question of a privity existing between the widow as beneficiary, and the administrator is clearly shown by the case of *M. K. & T. Ry. Co.* vs. *Wulf,* 226 U. S. 570. A widow brought the suit, alleging a cause of action under the Federal Employers' Liability Act. Of course under that act she technically had no authority to sue. In the meantime, the statute of limitations ran. An application was then made to substitute the administrator as plaintiff. This was permitted, this court holding that no new cause of action was introduced in the case, saying:

> "Nor do we think it was equivalent to the commencement of a new action so as to render it subject to the two years limitation prescribed by Section 6, of the Employers' Liability Act. *The change was in form rather than in substance.*"

In the case of *Lathrop* vs. *Schuttle,* 61 Minn. 196, 63 N. W. 493, the court in speaking of an action brought by the father under the statute, for injuries to the minor child, said:

> "Whatever is recovered, if anything, belongs to the child, and the father holds it in trust for him. * * * The judgment in this action by the parent *is a bar to any subsequent action for the same cause prosecuted*

by the minor, by his guardian, general or ad litem, or by himself, when he reaches majority."

In the case of *Bamka* vs. *Omaha Ry.*, 61 Minn. 549, 63 N. W. 1116, the court said:

"For in an action brought by a person as an administrator or as a guardian, general or special, *he is not a party properly speaking, although he is nominally. The real party is the estate he may represent as administrator or the minor in whose behalf he, as guardian, prosecutes the action."*

In *Telford* vs. *McGillis*, 130 Minn. 397, 153 N. W. 758, the court said:

"It does not matter that intervenor was not a formal party to this action. *It was brought in the name of his representative, and this concludes him."*

In *Corcoran* vs. *Chesapeake & Ohio Ry.*, 94 U. S. 741, Corcoran was trustee for the bondholders. As such trustee he brought suit, but was defeated. Later he brought a second suit as a bondholder. It was held that the judgment against him as trustee bound him individually because, as trustee, he represented himself individually.

In the case of *In re Bell (Cal.)*, 153 Cal. 331, 95 Pac. 372, the court said:

"A judgment denying the right of a widow to any credit for family allowances rendered in proceedings for the settlement of her account as administratrix is conclusive on her right to a family allowance in a subsequent proceeding therefor, instituted by her individually, *she being, in both proceedings, the real party in interest,* asserting individually and not representative rights."

In the case of *In re Parks*, 166 Ia. 403, 147 N. W. 850, the court said:

"It may be conceded that theoretically the former suit against Mrs. Parks individually was not against the same defendant as is the present suit against her as administratrix of an estate. Under the facts of this case, however, *such theoretical distinction loses its ap-*

plication and is without practical value to the appellant. * * * * If there were any persons beneficially interested in such an estate other than herself individually, a somewhat different question would be presented. But there are none. * * * * Mrs. Parks, as administratrix, therefore, is representative of no other beneficiary than herself as sole heir of the decedent."

In the case of *Chandler* vs. *White Oak Creek Lumber Co.* (Tenn.) 173 W. 449, Chandler held certain land as trustee for himself and others. Suit was brought against him individually (not as trustee), and against all other beneficiaries of the trust, to quiet title. Judgment was obtained. Later, as trustee, he brought suit to recover possession of this land. It was held that he, as trustee, was estopped by this judgment against the beneficiaries of the trust. This is exactly the situation here.

In 23 *Cyc.* page 1245, the rule is stated as follows:

"Although one is not nominally or formally a party to an action, he will be concluded by the judgment therein if he was represented, as to his rights or interests in the subject matter, by a party legally entitled to represent him, or who actually conducted the prosecution or defense on the behalf and for the benefit of such person."

In support of this rule (see Note 32), there are cited cases from the Supreme Courts of sixteen states, as well as the courts of the United States and Canada.

See also 34 *Corpus Juris* 999 and cases cited.

In *Black on Judgments, 2nd Edition, Section* 538, it is stated:

"Where a suit is prosecuted by one person for the use of another, the latter being the equitable owner of the claim and the real party in interest, a judgment will bar a second suit by the latter."

In *Jackson* vs. *Industrial Board,* 280 Ill. 526, 117 N. E. 705, the court said:

"It is argued by the plaintiff in error that *notwithstanding the fact that the Circuit Court by its judgment on the demurrer determined that the deceased was not engaged in interstate commerce,* and for that reason gave judgment on demurrer, the judgment of the court in that case does not estop plaintiff in error to contend in this proceeding that the deceased was in fact engaged in interstate commerce. *The court by its judgment in that case determined one question of fact that necessarily defeated the administratrix in that suit, i. e., that the deceased was not engaged in interstate commerce, and for that reason she could not maintain her suit under the Federal Employers' Liability Act. That judgment completely estops plaintiff in error as well as the administratrix from contending in any other suit between the same parties that the deceased was injured while employed by plaintiff in error, in interstate commerce.*"

In *Grant* vs. *Winona Ry. Company,* 85 Minn., 422, 89 N. W. 60, the court held that Railway bondholders were in privity with the Trustee under the mortgage. The court said:

"In such an action it is neither necessary nor proper to make the bondholders parties, for, as to the trust property, the trustee who holds the legal title thereof is unquestionably their representative, and they will (there being no fraud or collusion) be bound by the result of any action touching the trust property to which the trustee is a party."

In the case of *Connolly* vs. *Connolly,* 26 Minn. 350, the court held that the heirs of an estate were in privity with the administrator, saying:

"We have no doubt that the administrator had authority to enforce the cause of action against the Connollys. Acting as administrator in enforcing the same, he acted for the estate, and *the estate and all persons interested in it were therefore bound by the judgment which he recovered.*"

See also

Parsons vs. *Urie,*
104 Maryland 238, 64 Atl. 927.
Rowell vs. *Smith,*
123 Wis. 510, 102 N. W. 1.
Black on Judgments,
2nd Ed., Sec. 537.

The court below relied on the *Dennison* case in reaching its conclusion, merely citing the case *Troxell* vs. *Delaware & Lackawanna Railway Company,* 227 U. S. 434 and saying that:

> "The circumstances were different but the rule as to the necessity of identity of parties was stated there."

The *Dennison* case is based wholly on the *Troxell* case and wholly ignores the *Williams* case. The *Williams* case so clearly distinguishes the *Troxell* case as to leave nothing to be said.

When it is borne in mind just what the *Troxell* case decided it is apparent that the case is not an authority upon this proposition at all.

The Troxell case had a long history. Mrs. Troxell brought suit as widow for the death of her husband under the Pennsylvania, "death-by-wrongful-act statute."

Two grounds of negligence were alleged:

(1.) Defective Instrumentality.
(2.) Negligence of a fellow-servant.

The State of Pennsylvania had not abolished the fellow-servant doctrine. At the trial therefor, Mrs. Troxell had to and did expressly abandon the negligence of a fellow-servant as a ground of recovery.

She recovered a verdict based on the defective instrumentality. A motion for judgment, notwithstanding the verdict was denied. (180 Federal 871.)

Upon writ of error the Circuit Court of Appeals of the Third Circuit held that there was no evidence of a defective instrumentality. It therefore reversed the judgment

and since it had held that there was no evidence upon the only ground of negligence claimed, it granted judgment notwithstanding the verdict. (183 Federal 373.)

This was before the decision in *Slocum* vs. *New York Life Insurance Company,* 228 U. S. 364, which held that judgment notwithstanding the verdict could not be granted by a Federal Court.

Judgment was entered on the merits in the District Court pursuant to the decision of the Circuit Court of Appeals.

Mrs. Troxel was then appointed Administrator of her husband's estate and brought a new suit under the Federal Employers' Liability Act. This time she alleged as a ground of negligence the act of a fellow-servant, the fellow-servant doctrine having, of course, been abolished by that act. She obtained as Administrator, a recovery on that ground alone, which on writ of error was by the Circuit Court of Appeals, reversed on the ground of *res judicata* under the first judgment (200 Federal 44.)

This court reversed the Circuit Court of Appeals, (227 U. S. 434), holding that the first judgment did not bar the second suit. This court mentioned the distinction between estoppel by judgment or *res judicata* in its broadest sense, and estoppel by verdict, using the language which has already been quoted on page 19 of this brief.

This court also stated:

> "To work an estoppel the first proceeding and judgment must be a bar to the second one because it is a matter already adjudicated between the parties. The cause of action under the state law, if it could be prosecuted to recover for the wrongful death alleged in this case, was based upon a different theory of the right to recover than prevails under the Federal statute. Under the Pennsylvania law there could be no recovery for the negligence of the fellow-servants of the deceased. This was the issue upon which the case was

submitted at the second trial and a recovery had. Whether the plaintiff could recover under the Pennsylvania statute was not involved in the second action, and the plaintiff's right to recover because of the injury occasioned by the negligence of the fellow-servants was not involved in or concluded by the first suit."

This court held that all that was actually decided in the first suit was that there was no defective instrumentality, but in the first suit there was no decision on the question of negligence of a fellow-servant.

The verdict in the second case was based solely upon the fellow-servant negligence and not in any way upon a defective instrumentality, therefore, there was no issue involved in the second suit which was decided in the first suit.

The first suit arose under the Pennsylvania act. The second suit arose under the Federal Employers' Liability Act. Therefore, the causes of action were not the same. Therefore, the rule as to estoppel by verdict rather than estoppel by judgment applied and since estoppel by verdict requires that the particular matter be determined in the first suit, to be a bar to the second and since no fact in the second suit was actually determined in the first there was no estoppel by verdict, and therefore no estoppel at all.

The same result would have been reached, had the administrator been the party in both actions.

The court did discuss the question of the privity between the widow as Trustee under the Pennsylvania act and the Administrator as Trustee under the Federal Employers' Liability Act, although this was unnecessary to the decision.

A holding that no cause of action exists under the state law certainly does not adjudicate that no cause of action exists under the Federal law. This would be true even though there were the same plaintiff in each case,

nominally; but if there had been a recovery by the widow under the state law, could there be any doubt that this precluded an additional recovery by the administrator under the Federal law? Any other rule would permit of two recoveries; one by the widow under the state law and one by the administrator for the widow under the Federal law. The widow could prove intrastate commerce in one jurisdiction and then the administrator in a second action could attempt to prove what was adjudicated in the other action not to be true, and, by entirely different evidence, perhaps obtain another recovery. Such is certainly not the law where the recovery in either event goes to the same person.

In the court below counsel relied on the case of *Ingersoll* vs. *Coram*, 211 U. S. 335. This case merely holds that an administrator appointed by the courts of one state is not in privity with an ancillary administrator in the same state appointed by the courts of another state. In that case this court rather intimated that is conclusion was somewhat doubtful, and that it would not so decide were the question a new one; but it adhered to a doctrine which it had already announced in prior decisions.

It should likewise be noted that in the *Ingersoll* case the first judgment which was relied on as an estoppel was a judgment permitting no recovery. This court certainly never intended to lay down a rule which would permit two different recoveries by separate administrators upon the same identical cause of action. If this is what the *Ingersoll* case means, then by the simple expedient of having a different administrator appointed in each state, there can be forty-eight recoveries for every death case under the Federal Employers' Liability Act.

There is certainly nothing in the opinion in the *Troxell* case which suggests that this court intended to depart from

the well established doctrine announced in the *Corcoran* case, (94 U. S. 741), already referred to where this court held that a Trustee and a cestui que trust were in privity, and said:

> "It would be a new and very dangerous doctrine in the equity practice to hold that the cestui que trust is not bound by the decree against his trustee *in the very matter of the trust for which he was appointed.*"

While of course we recognize that a California decision is not a precedent binding upon this court, because of the clear and satisfactory reasoning in the case of *Williams* vs. *Southern Pacific,* supra, we have attached a copy of that decision as an appendix.

The court below was clearly wrong in the determination of a Federal question arising under the Constitution of the United States. The judgment should therefore be reversed.

Respectfully submitted,

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and that the parties to the two proceedings are not identical, in that the plaintiff sued as an individual in the one and and as administratrix in the other.

In *Western Metal Supply Co.* vs. *Pillsbury*, 172 Cal. 411, 156 Pac. 491, Ann. Cas. 1917 E, 390, it is said:

> "Where compensation is sought the proceedings are in substance those of a court in an action at law. * * * After hearing by the Commission, it makes and files its findings of fact and its 'award which shall state its determination as to the rights of the parties.' * * * The findings thus made are 'conclusive and final' * * * and the award itself is not reviewable except by a writ of certiorari under which the review is restricted in scope. * * * Any party in interest may file a certified copy of the findings and award with the clerk of the superior court, and judgment must be entered by the clerk in conformity therewith. * * * We shall not take the time to review in detail the cases just cited, but content ourselves with saying that we think there is nothing in them which would support the claim that the powers exercised by the Industrial Accident Commission of this state in making awards of compensation are not strictly judicial."

See also, *Carstens* vs. *Pillsbury*, 172 Cal. 576, 158 Pac. 218; *Pacific Coast Casualty Co.* vs. *Pillsbury*, 171 Cal. 319, 153 Pac. 24; *Gouanillou* vs. *Industrial Accident Commission* (Sup.) 193 Pac. 937; *Massachusetts, etc., Co.* vs. *Industrial Accident Commission*, 176 Cal. 491, 168 Pac. 1050.

The findings of the Industrial Accident Commission are *res adjudicata. In re Hunnewell*, 220 Mass. 351, 107 N. E. 934; *Centralia Coal Co.* vs. *Industrial Accident Commission*, 297 Ill. 513, 130 N. E. 727.

(1) It is not claimed that either the action in the superior court or the proceeding before the Commission could have been successfully pleaded in abatement of the prosecution of the other, but respondent cites 15 *Corpus Juris*, 1161, to the effect that—

> "Where two tribunals have concurrent jurisdiction over the same parties and subject-matter, the tribunal where jurisdiction first attaches retains it exclusively, and will be left to determine the controversy and to fully perform and exhaust its jurisdiction and to decide every issue or question properly arising in the case."

At page 1165 of the same volume, however, it is stated that—

> "The rule is limited to actions which deal either actually or potentially with specific property or objects, and where a suit is strictly *in personam*, nothing more than a personal judgment being sought, there is no objection to a subsequent action in another jurisdiction."

There is some confusion in the decisions because of failure to recognize the limitation just stated. In strictly personal actions the great weight of authority sustains the rule as stated in the case of *Boatmen's Bank* vs. *Fritzlen,* 135 Fed. 667, 68 C. C. A. 288, that—

> "It is not the final judgment in the first suit, but the first final judgment, although it may be in the second suit, and renders the issues in such a case *res adjudicata* in the other court."

For further authorities to the same effect, see *Insurance Co.* vs. *Harris,* 97 U. S. 331, 24 L. Ed. 959; *Schuler* vs. *Israel,* 120 U. S. 506, 7 Sup. Ct. 648, 30 L. Ed. 707; 1 Freeman on Judgments (4th Ed.) § 320; *Jones* vs. *Jones,* 108 N. Y. 415, 15 N. E. 707, 2 Am. St. Rep. 447; *Lancashire Ins. Co.* vs. *Corbetts,* 165 Ill. 592, 46 N. E. 631, 36 L. R. A. 640, 56 Am. St. Rep. 280; *Davis* vs. *Bedsole,* 69 Ala. 362; *Bourgeois* vs. *Jackobs,* 45 La. Ann. 1310, 14 South. 68; *Oxford* vs. *Paris,* 33 Me. 179; *Bank of U. S.* vs. *Merchants' Bank,* 7 Gill (Md.) 415; *Marble* vs. *Keyes,* 9 Gray (Mass.) 221; *Allis* vs. *Davidson,* 23 Minn. 442; *Nave* vs. *Adams,* 107 Mo. 414, 17 S. W.

958, 28 Am. St. Rep. 421; *Casebeer* vs. *Mowry*, 55 Pa. 419, 93 Am. Dec. 766.

(2) The plaintiffs in the two proceedings are not the same, and therefore the award of the Commission is not a bar to the whole cause of action in the superior court. *Troxell* vs. *Delaware, L. & W. R. Co.*, 227 U. S. 434, 33 Sup. Ct. 274, 57 L. Ed. 586.

> "A judgment obtained by one or more of several joint owners or creditors, having claims against a common debtor, is not a bar to a subsequent action by the other claimants, or separate suits by each of them, for the recovery of their claims, although it is *res adjudicata* as to the claims of those who brought the former suit." 15 Standard Encyc. of Prac. 514; *Suisun L. Co.* vs. *Fairfield School District*, 19 Cal. App. 594, 127 Pac. 349; *Harris* vs. *Alcock*, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158.

(3) A material issue in both proceedings was the character of Williams' employment; if intrastate, the Commission had exclusive jurisdiction to award compensation; if interstate, then the jurisdiction was in the superior court. The Commission determined that the employment was in intrastate commerce, and the fact—

> "so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." *Southern Pacific*

R. Co. vs. *United States*, 168 U. S. 1, 18 Sup Ct. 18, 42 L. Ed. 335; 2 Black on Judgments (2d Ed.) § 506.

In *Spokane & Inland Empire R. Co.* vs. *Whitley*, 237 U. S. 487, 35 Sup. Ct. 655, 59 L. Ed. 1060, L. R. A. 1915 F, 736, in construing a statute of Idaho similar to the Federal Employers' Liability Act, the court said:

> "The recovery authorized is not for the benefit of the 'estate' of the decedent; the proceeds of the recovery are not assets of the estate. Where the personal representative is entitled to sue, it is only as trustee for described persons, the 'heirs' of the decedent. * * * They are the sole beneficiaries. * * * It may also be premised that, when suit is duly brought by the trustee under such a statutory trust, it is a necessary and conclusive presumption that the trust will be executed and the rights of the beneficiaries as fixed by the statute which created the obligation will be recognized by all courts before whom the question of distribution may come."

In *Ruiz* vs. *Santa Barbara Gas etc., Co.*, 164 Cal, 191, 128 Pac. 332, it is said:

> "It is settled by the decisions Sections 377 of the Code of Civil Procedure is one solely for the benefit of the heirs, * * * that the money recovered in such an action does not belong to the estate but to the heirs only, and that an administrator has the right to bring the action only because the statute authorizes him to do so, and that he is simply made a statutory trustee to recover damages for the benefit of the heirs."

In *Corcoran* vs. *Chesapeake & O. Canal Co.*, 94 U. S. 741, 24 L. Ed. 190, the plaintiff brought the suit upon certain bonds and the defendant pleaded a prior judgment as a bar. The court, in sustaining the plea, said:

> "It is also argued that in that suit Corcoran was only a party in his representative capacity of trustee, and he here sues in his individual character as owner of the bonds, * * * and in this latter capacity is not bound by that decree. But why is he not bound? It

was his duty as trustee to represent and protect the holders of these bonds; and for that reason he was made a party, and he faithfully discharged that duty. It would be a new and very dangerous doctrine in the equity practice to hold that the *cestui que trust* is not bound by the decree against his trustee in the very matter of the trust for which he was appointed. If Corcoran owned any of these bonds and coupons then, he is bound, because he was representing himself. If he has bought them since, he is bound as a privy to the person who was represented."

In *Estate of Bell,* 153 Cal. 331, 95 Pac. 372, the court arrived at a similar conclusion where the administratrix had proceeded in her representative capacity in one case and in her individual capacity in the other. The court said:

"In both proceedings she was the real party in interest, asserting individual and not representative rights, and is bound by the judgment."

See also, *In re Parks' Estate,* 166 Iowa, 403, 147 N. W. 850; *Chadler* vs. *White Oak Creek Lumber Co.,* 131 Tenn. 47, 173 S. W. 449.

In 2 Black on Judgments (2d Ed. § 536, it is said:

"If one sues as trustee, and afterwards in his individual capacity, in respect of the same subject-matter, he is bound by the decree in the former suit. For if, at that time, he owned the subject of the trust, he was representing himself."

(4) Without multiplying authorities, it may be stated as a general rule that, where one appears in a representative capacity in one action and in his individual capacity in another action, involving the same subject-matter, without any change in his relation to that subject-matter, a judgment in one case is conclusive of his rights in the other.

Counsel for respondent contends that the rule as thus stated is in conflict with that laid down in the case of *Troxell* vs. *Delaware, Y. & W. R. Co.*, 227 U. S. 434, 33 Sup. Ct. 274, 57 L. Ed. 586. The judgment pleaded as a bar in that case was given in an action by Mrs. Troxell as surviving widow in behalf of herself and children for the death of her husband. The court in that action held that it was brought under the state law.

> "In such an action there could be no recovery because of the negligence of the fellow workman of Troxell. The jury was confined to the question of responsibility for failing to provide proper safety appliances."

The plaintiff was given judgment, which was reversed on appeal. The second action was then brought by Mrs. Troxell, as administratrix, under the federal act, under which there might be a recovery for the negligence of fellow workmen. In the second action the trial court held that—

> "The former case had adjudicated matters as to defects in cars, engines and rails (and) submitted to the jury only the question of the negligence of fellow-servants."

Judgment was again rendered in favor of the plaintiff, and the Circuit Court of Appeals "reversed the judgment, holding that the first proceeding and judgment was a bar to recovery in the second action." In overruling the decision of the Circuit Court of Appeals, the Supreme Court held that—

> "Where the second suit is upon a different claim or demand, the prior judgment operates as an estoppel only as to matters in issue or points controverted and actually determined in the original suit. * * * And the plaintiff's right to recover because of the injury occasioned by the negligence of the fellow-servants was not involved in or concluded by the first suit."

The court further held that—

"There was not that identity of parties in the former action by the widow and the present case, properly brought by the administratrix under the Employers' Liability Act, which renders the former suit and judgment a bar to the present action."

(5) Appellant urges that this latter statement by the court is mere dictum, but—

"Where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other." *Union P. R. Co.* vs. *Mason City & Ft. D. R. Co.*, 199 U. S. 160, 26 Sup. Ct. 19, 50 L. Ed. 134."

The decision goes no further than to hold that, because there was not identity of parties plaintiff in the two actions, the second was not wholly barred by the judgment in the first. The question whether an issue actually determined in the first was conclusive on the same issue in the second as against a recovery for the benefit of Mrs. Troxell was not before the court. The trial court held that the judgment in the first action was a bar as to all issues actually determined in that suit. The correctness of this holding was not in controversy before the higher court, and was not considered by it. The opinion in the *Troxell* case does not warrant the conclusion that the court intended thereby to overrule its prior decision in the *Corcoran* case, supra, and similar decisions by the highest courts of many of the states.

(6) In the proceeding before the Commission of Mrs. Williams, she appeared in her individual capacity, and in the action in the superior court she represented herself as one of the beneficaries, and had control of the prosecution of the case.

"Parties, in the larger legal sense, are all persons having a right to control the proceedings, to make de-

fense, to adduce and cross-examine witnesses, and to appeal from the decision, if an appeal lies." *Green* vs. *Bogue,* 158 U. S. 478, 15 Sup. Ct. 975, 39 L. Ed. 1070."

Having recovered judgment for compensation in the proceeding before the commission by establishing the fact that the deceased was employed in intrastate commerce, and that judgment having become final, she could not recover in the action in the superior court by disproving the same fact on which the first judgment was necessarily based.

Not knowing what the determination of the trial court would be as to the character of employment of the deceased, and naturally desirous of avoiding an entire failure of compensation, the plaintiff felt the necessity of making the application to the Commission, even though recovery in that tribunal is limited in amount. In states which provide but one tribunal for the trial of such actions, that tribunal determines in the one action whether the employment was interstate or intrastate, and renders judgment accordingly under the federal act or the state law as the case may warrant, and the predicament in which the plaintiff herein found herself cannot arise.

The judgment was for $25,000, of which $5,000 was apportioned to Vivian Peabody, an adult married daughter of the deceased. The complaint alleges that she was not dependent upon the deceased. Not being dependent, she was not entitled to compensation under the state law, and she was not a party to the proceeding before the Commission. It is clear that the award of the Commission is not a bar to a recovery in her behalf under the federal act, nor is any fact found by the Commission *res adjudicata* as to her. • • •

The judgment appealed from is reversed.

We concur: BURNETT, *J.;* HART, *J.*

No 683

IN THE

Supreme Court of the United States

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CLARENCE Y. HOPE, DECEASED,
Respondent.

MOTION OF RESPONDENT TO DISMISS, AFFIRM, OR TRANSFER FOR HEARING TO THE SUMMARY DOCKET AND BRIEF IN SUPPORT THEREOF.

TOM DAVIS AND ERNEST A. MICHEL,
Attorneys for Respondent,
Minneapolis, Minnesota.

Hayward Brief Company, 601-607 Fourth Ave. So., Minneapolis

INDEX.

TABLE OF CASES.

3rd: That the judgment of the Supreme Court of Minnesota be affirmed on the ground that the petition for writ of certiorari herein was sought for purposes of delay only.

4th: In case none of the above motions be granted, then the respondent moves the court that this action be transferred for hearing to the summary docket because the case is of such a character as not to justify extended argument.

TOM DAVIS AND ERNEST A. MICHEL,
Attorneys of Record for Respondent,
Minneapolis, Minnesota.

IN THE
UNITED STATES SUPREME COURT

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CLARENCE Y. HOPE, DECEASED, *Respondent.*

NOTICE OF MOTION.

The petitioner is hereby notified that respondent will, on the 16th day of November, A. D. 1925, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of said court the foregoing and annexed motions, and each of them, and the brief in support thereof, hereto attached, all of which are now and herewith served upon you.

TOM DAVIS AND ERNEST A. MICHEL,
Attorneys for Respondent,
Minneapolis, Minnesota.

Received a copy of the foregoing notice and the brief thereto attached, by personal service thereof, this..3....day of...November..... 1925.

.....A Bruce Hom + Stringer

Attorneys for Petitioner.

STATEMENT OF FACTS.

This action was tried in the District Court of Steele County, Minnesota, and resulted in a verdict in favor of the plaintiff. The action was one to recover damages for the death of Clarence Y. Hope. The case was founded on the Federal Employers' Liability Law. There was a verdict for plaintiff which was approved by the trial court and later judgment was entered on the verdict and this judgment was approved by the Supreme Court of the State of Minnesota.

ARGUMENT.

A writ of certiorari was granted to review the judgment herein. It was claimed by the railway company that a judgment was entered "In the matter of the award of compensation on account of the death of C. Y. Hope, deceased; *Mrs. C. Y. Hope, Appellant, v. Chicago, Rock Island & Pacific Railway Company, Appellee,*" and that this judgment was entered in the State of Iowa, affirming the action of the Iowa Compensation Board and that it constituted a bar to the maintenance of this action.

The Minnesota Supreme Court held that the judgment was not a bar because there was no identity of parties.

The Minnesota Supreme Court further held that the plaintiff proceeding under the Federal Act, could not be deprived of his right to prosecute his action in a court as

existing *at common law,* by the action of a railway company in starting proceedings before a compensation board, after plaintiff had started his action under the Federal statute.

PLAINTIFF'S ACTION IN MINNESOTA WAS COMMENCED BEFORE THE RAILWAY COMPANY STARTED ITS PROCEEDING BEFORE THE IOWA COMPENSATION BOARD.

Both Minnesota Courts held decedent was engaged in interstate commerce.

The Minnesota Court held that within the reasoning of such cases as *Troxell v. Delaware, L. & W. R. Co.*, 227 U. S. 434, 57 L. Ed. 586, there was *no identity of parties* in the action before the Compensation Board in Iowa and the action by the administrator in the District Court of Minnesota, under the Federal Act.

THE FEDERAL ACT SUPREME.

The cases in this Court are unanimous in holding that the Federal Act is supreme in its sphere and *cannot be interfered with by any State act or proceeding.* Therefore, the act of the Iowa Commission could not interfere with the recognized Federal right of plaintiff in the Minnesota Court.

The Federal right being supreme, and there being no identity of parties in the two actions, we submit to this Court that the writ herein was improvidently granted and that it should now be dismissed. If the dismissal be not granted, we submit to the Court that, under the unanimous holdings of this Court, relative to the supremacy of the Federal statute, the judgment of the Minnesota Court should be affirmed.

IF MOTION TO DISMISS OR AFFIRM BE DENIED, THE CAUSE SHOULD BE ADVANCED FOR HEARING TO THE SUMMARY DOCKET.

Decedent was injured on the 4th day of February, 1923, his death resulting some days thereafter. It is now October, 1925, and plaintiff's rights (respondent here) are still undetermined.

We believe it is manifest that under the decisions of the Supreme Court of the United States this cause must of necessity be determined in favor of respondent and that, in view of the many cases of this Court upholding the Federal statute, it cannot be held other than that the Federal Act is supreme and supersedes all State laws.

With all due respect to counsel for petitioner, we suggest that the petition for writ of certiorari herein was filed for purposes of delay.

The case at bar involves no great legal principle.

It involves no question of construction of a Federal statute nor any grave constitutional question or legal principle.

The decision of the case can be of little importance to anyone save to the railway company and the surviving widow of decedent.

The issues in the case are very simple. They can be adequately presented to the Court within the time allotted for presenting causes on the summary docket. The avoidance of the law's delay demands that there be a speedy hearing and a termination of this cause.

The questions involved are of such a nature that respondent prays, if said writ be not dismissed as prayed for, that the court place the cause on the summary docket for

hearing, as provided by the rules of this Honorable Court.

Dated at Minneapolis, Minnesota, October 31st, 1925.

Respectfully submitted,

TOM DAVIS AND ERNEST A. MICHEL,

Attorneys for Respondent,

Minneapolis, Minnesota.